Supreme Court, U. S.
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No. 80-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MANASSAS PARK

and

UPPER OCCOQUAN SEWAGE AUTHORITY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES S. PERRY
STEPHEN M. COLANGELO
BOOTHE, PRICHARD & DUDLEY
711 Princess Street
P.O. Box 1101
Alexandria, Virginia 22313
(703) 549-5900

Attorneys for Petitioner, City of Manassas Park

C. STANLEY DEES
MAUREEN DUIGNAN
SELLERS, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

and

TURNER T. SMITH
9253 Lee Avenue
Manassas, Virginia 22110

Attorneys for Petitioner, Upper Occoquan Sewage Authority

QUESTIONS PRESENTED

Under a grant contract, the United States Environmental Protection Agency required that a specific method of construction be used in building an advanced waste water treatment plant. That method of construction produced an unreasonable and commercially impracticable result. The questions presented are:

(a) Whether the federal government is accountable for the consequences of conditions wrongfully imposed under grant contracts as it is under other types of government contracts.

(b) Whether a method of construction required by a federal grantor under a grant contract implies a warranty that the method of construction is reasonable and commercially practicable.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, the City of Manassas Park and the Upper Occoquan Sewage Authority, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Claims entered in this proceeding on July 16, 1980.[1]

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[1] The petitioners to the proceeding in the Court of Claims whose judgment is now sought to be reviewed were the City of Manassas Park, City of Manassas, Prince William County, Fairfax County and the Upper Occoquan Sewage Authority. The United States was the respondent.

OPINION BELOW

The opinion of the Court of Claims, not yet officially reported, appears in Appendix A hereto, p.1a, *infra.*

JURISDICTION

The opinion of the Court of Claims was decided and judgment entered on July 16, 1980, granting the United States' Motion for Summary Judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) (1976).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant statutory provision involved in this action is the Tucker Act, 28 U.S.C. § 1491 (Supp. II 1978), which provides in pertinent part that:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The relevant regulation involved is found at 40 C.F.R. § 35.903(a) (1973), which provides that:

> The construction of federally financed waste treatment works generally is accomplished in three steps—(1) preliminary plans and studies, (2) preparation of construction drawings and specifications, and *(3) fabrication and building of a complete and operable treatment works.* (Emphasis added).

STATEMENT OF THE CASE

This case concerns a grant contract made by the United States Environmental Protection Agency (EPA) and the Upper Occoquan Sewage Authority (UOSA) pursuant to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.*, for the construction of a sewage treatment plant. The petitioner, City of Manassas Park, a small municipality in Virginia, is a member of UOSA and a third-party beneficiary of the grant contract.[2] The petitioner, UOSA, is a regional authority organized by four Virginia localities pursuant to the Virginia Water and Sewer Authorities Act. VA. CODE ANN. § 15.1-1239 *et seq.* (1973). Suit was filed in the Court of Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, alleging that conditions wrongfully imposed on the grant contract resulted in an increased cost of construction of approximately $33 million and an increase of the local share of those costs of approximately $12 million. Defendant's Motion for Summary Judgment was granted prior to trial so the facts must be taken as alleged by the petitioners.

The regional advanced waste water treatment project which was the subject of the grant contract was designed to satisfy stringent standards imposed by EPA for discharges into the Potomac River. UOSA was organized as a regional authority to satisfy federal requirements for the receipt of funds for the development, construction and operation of the project.

The proposed project was to include a centralized advanced waste water treatment plant and interconnecting piping and pumping stations to transport the sewage from existing stations to the plant. In 1972, the preliminary engineering report for the project was approved by EPA. Pursuant to the

[2] The United States disputes Manassas Park's status as a third-party beneficiary to the grant contract, but this issue was not decided below and is not at issue here. The United States concedes UOSA is a proper party.

1972 Amendments to the Federal Water Pollution Control Act, approximately $145.7 million and $174.9 million were allocated to Virginia for 1973 and 1974 from which the construction of the project was to be funded in full. However, President Nixon illegally impounded[3] a substantial portion of the allocated funds so the construction of the project had to be broken into segments for funding in separate years.

The first segment was to include the plant proper, the second segment the pumping stations, and the third segment the connecting sewer lines. The total cost of construction in this manner would have been $49.4 million and the project would have been completed in 2-1/2 years.

Following the preparation of the original design package and contract documents, new regulations were promulgated to implement the grant authority under the Act. *See* 38 Fed. Reg. 5329 (1973). These regulations required that the construction phase result in the "fabrication and building of a complete and operable treatment works." The original design and construction plan prepared by UOSA was in compliance with these regulations, since the construction phase would have resulted in an operable treatment works completed in three segments.

However, in late May of 1973, the administrator of Region III of EPA rejected the proposed design and construction plan because he misinterpreted the *operable works* regulation to require that each *segment* within the construction phase be a complete and separably operable unit.

EPA refused to permit the project to proceed as proposed by UOSA. Consequently, UOSA was forced to reorder the construction of the plant in accordance with the misinterpretation of the regulation that each segment of construction would function as a separately operable unit. As a result, the total capital cost for the project increased approximately

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[3] *See Train v. City of New York*, 420 U.S. 35 (1975).

$33 million, thereby increasing the local share to be paid by the four localities comprising UOSA by $12 million.

The misinterpretation of the regulation by a regional administrator of EPA was clearly contrary to the intent of Congress and immediately after UOSA was forced to change the proposed order of construction, Congress amended the law to insure that the condition imposed in the UOSA grant contract be deleted from any future grant contracts. *See* 33 U.S.C. § 1283(d). Unfortunately, this amendment came too late to save UOSA from the wasted expenditure caused by the misinterpretation.

The petitioners maintain that the method for construction of the plant mandated by EPA as a condition of the grant agreement is commercially impracticable and constitutes a breach of the implied warranty which this Court recognized in government contracts in *United States v. Spearin*, 248 U.S. 132 (1918). The Court of Claims denied the existence of an implied warranty associated with grant contracts because of what it termed the "gratuitous nature" of grant contracts.

REASONS FOR GRANTING THE PETITION

The size and scope of federal grant programs have increased dramatically in the past few decades, generating much confusion but little case law in their wake. Petitioners' request for a writ of certiorari offers this Court the opportunity to dispel some of the considerable uncertainty surrounding this emerging field of law by deciding a novel and important issue relating to the rights and obligations of parties to a federal grant agreement.

In 1950, 5.3 percent of the total federal budget was devoted to grant-in-aid programs.[4] This figure soared to an

[4] Office of Management and Budget, "Special Analysis H, Federal Aid to State and Local Governments," in *Special Analysis, Budget of the United States Government, 1979* at 184, Table H-5.

estimated 17.4 percent for fiscal year 1979.[5] Thus, the federal government now spends approximately $100 billion every year—almost $300 million each day—for the management and funding of federal grant programs.[6] These programs, which touch every aspect of American life, are aimed to resolve problems of national concern with respect to urban renewal, roads, housing, waste disposal and sewage treatment. Despite the impact and significance of such endeavors, very little judicial authority exists relating to the federal government's role and responsibility in the administration of grant contracts. Petitioners' case illustrates all too clearly the gravity of the problems resulting from this lack of judicial guidance and demonstrates the "need for a fuller body of law concerning this slumbering giant...." *Southern Mutual Help Association v. Califano,* 574 F.2d 518, 522 (D.C. Cir. 1977).

At issue in the instant action is far more than petitioners' right to hold the federal government contractually liable for the commercially impracticable grant conditions it prescribed. The general issue before this Court is whether or not the federal government is contractually immune from the consequences resulting from the conditions it unilaterally imposes in a grant agreement. The contractual rights of the thousands of grantees discharging their public responsibilities each and every day is a sufficiently important reason to justify this Court's close examination of this question and the general state of federal grant law. The scope of the government's responsibility under grant contracts is of broad public significance. The important matters at stake warrant clarification which only this Court can provide.

Petitioners filed suit in the Court of Claims based on EPA's breach of an implied warranty to a grant contract between UOSA and EPA. Under the implied warranty theory, which

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[5] *Id.*

[6] *Wallick & Montalto, "How Naked at the Day of Judgment: Improving the Remedies Systems for Grant-Type Assistance,"* 10 Pub. Cont. L.J. 177, 179 (1978).

this Court recognized in government contracts in *United States v. Spearin,* 248 U.S. 132 (1918), the United States may be held liable for the damages incurred by a contractor when the government's design produces an unreasonable or commercially impracticable result.[7] Petitioners maintained that EPA breached this warranty when its regional administrator misinterpreted the "operable works" regulation and mandated a design approach for the construction of the UOSA facility that was commercially impracticable to build.

The Court of Claims has ruled that grant agreements are contracts enforceable in that Court pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. § 1491. *Texas v. United States,* 537 F.2d 466 (Ct. Cl. 1976). Since grants are contracts, they should contain the implied warranties which the Court of Claims and this Court have recognized in other government contracts. The Court below illogically repudiated the existence of such warranties.

In the instant decision at p. 5a, *infra,* the Court of Claims reiterated its holding that a grant agreement is an enforceable contract. However, the court refused to hold the government accountable for the consequences of the conditions it imposed on the grant. Rather, it limited the federal government's contractual liability under a grant agreement solely to its "express undertakings." *Id.* The court proceeded to state in the same paragraph that "[w]hen the government prescribes how grant money is to be used, it is performing sovereign acts for which it is not liable on a contract theory." *Id.* Without ever reaching the merits of petitioners' claim, the court dismissed their petitions and the *Spearin* implied warranty theory, reasoning that the warranty did not apply because of the "gratuitous

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[7] The *Spearin* warranty that the government's design will produce an adequate result is an important principal in public contract law. *See Hol-Gar Manufacturing Corp. v. United States,* 360 F.2d 634 (Ct. Cl. 1966) and *R.M. Hollingshead Corp. v. United States,* 111 F. Supp. 285 (Ct. Cl. 1953).

nature of the grant." *Id.* The court determined that the method of construction mandated by EPA did not imply a warranty that such a method was either reasonable or practicable. Therefore, the Court of Claims concluded that no remedy was available to petitioners since their claim was "not contractual, but...one for misgovernment excluded from Tucker Act jurisdiction...." *Id.*

It is impossible to determine whether the Court of Claims is in fact treating a grant as a contract enforceable against the United States or merely as a gift clothed with sovereign immunity. If a grant agreement is an enforceable contract, it should create mutually enforceable obligations. The Court of Claims, however, has applied a one-sided interpretation to the grant contract in the instant action by considering it a gift unburdened with governmental obligations.

As the law now stands, a federal grantor is not accountable for the consequences resulting from the grant conditions it imposes.[8] Unless grants are found to create mutually enforceable obligations the government is free to dictate any condition for the receipt of grant money—with no accompanying liability—even though such terms may ultimately bring about an outrageous result. This Court should decide whether a federal grantor is contractually liable when it imposes arbitrary and erroneous conditions to a grant agreement.

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[8] The United States Court of Claims is the only available forum where a party may sue the Federal Government for contract damages.

CONCLUSION

For the reasons set forth above, petitioners respectfully request this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

C. STANLEY DEES
MAUREEN DUIGNAN

SELLERS, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

TURNER T. SMITH
9253 Lee Avenue
Manassas, Virginia 22110

Attorneys for Petitioner, Upper Occoquan Sewage Authority

and

CHARLES S. PERRY
STEPHEN M. COLANGELO

BOOTHE, PRICHARD & DUDLEY
711 Princess Street
P.O. Box 1101
Alexandria, Virginia 22313
(703) 549-5900

Attorneys for Petitioner, City of Manassas Park

APPENDIX A

In the United States Court of Claims

No. 506–78

(Decided July 16, 1980)

CITY OF MANASSAS PARK,
A Municipal Corporation
v. THE UNITED STATES

Charles S. Perry, attorney of record for City of Manassas Park. *Edward F. Rodriguez, Jr.*, *Stephen M. Colangelo* and *Boothe, Prichard & Dudley*, of counsel.

C. Stanley Dees for third-party plaintiffs. *Turner T. Smith*, attorney of record for third-party plaintiff Upper Occoquan Sewage Authority. *Maureen Duignan* and *Sellers, Conner & Cuneo*, of counsel.

Robert W. Bendall, attorney of record for third-party plaintiff City of Manassas. *Smith and Davenport*, of counsel.

T. A. Emerson, attorney of record for third-party plaintiff Prince William County.

Kathryn M. Anderson, attorney of record for third-party plaintiff Board of Supervisors, Fairfax County.

Robert M. Hollis, with whom was *Assistant Attorney General Alice Daniel*, for defendant. *Lee Dehihns*, of counsel.

Before SKELTON, *Senior Judge*, NICHOLS and SMITH, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

By the amended petitions the principal or lead claimant is the Upper Occoquan Sewage Authority (UOSA), a body corporate and politic of the Commonwealth of Virginia. Four creatures of that Commonwealth, Manassas, Manassas Park, Fairfax County, and Prince William County (municipalities), entered into a service agreement with UOSA to provide for an advanced waste water treatment system for the upper Occoquan, which flows into the Potomac. Manassas Park originally filed this action, and the other municipalities would now join as third parties. UOSA now claims to be suing for their benefit. The grant contract sued on here was made by UOSA with the United States Environmental Protection Agency (EPA) pursuant to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 and ff, and specifically § 1281(g)(1). The federal share of the grant is limited by § 1282 to 75 percent of cost, and the remainder must be borne by the grantee. UOSA having no taxing or borrowing authority of its own, any increase in the grantee's share is immediately borne by its founder municipalities.

The grievance here is that EPA arbitrarily and needlessly caused an increase in the project cost, rounded off, from $49,300,000 to $82,280,000, with corresponding increase ultimately borne by the municipalities of their ungranted 25 percent. It is not disputed that the government has absorbed and paid the corresponding larger increase in its own grant costs, occasioned by its own alleged folly. What the plaintiffs want is for the government to absorb enough more of their costs to reduce their burden to 25 persent of $49,300,000, not $82,280,000. We state the case at this point as it is stated to us. No evidence has yet been taken as to the actual extent of the cost overrun or the extent to which EPA caused it, and of course we make no fact-finding. The immediate problem of UOSA and the municipalities is to state their claim in a fashion that brings it within the jurisdiction of this court as against defendant's motion for summary judgment. We hold that they do not succeed.

The EPA, having spread the necessary granted funds over three years, construed its own regulation, as it then was, 40 C.F.R. § 35.603(a), 38 Fed. Reg. 5329 (1973) to require that the use of each annual grant be such as to produce a "complete and operable treatment works." Thus, in case of an unforeseen cutoff in later years, an earlier grant would not be exhausted in an unfinished and useless facility. It is easy to see how such a requirement might elevate the costs, as plaintiffs say it did, and it is ironic that it resulted from an effort at economy, President Nixon having impounded part of the grant funds. Whether EPA correctly construed its own regulations is one of the things the parties dispute, but we pass it over as an answer either way would not affect the result. EPA rejected plaintiffs' original plans because they did not conform to the regulation as interpreted. Plaintiffs submitted revised plans which did, and were approved. Plaintiffs are thus in the position of having acquiesced in the change. Their explanation for this is that they were not aware how great the cost overrun would be. They do not now show that EPA knew more, but hope to learn of something along the line of "superior knowledge" on discovery. We do not think such discovery is necessary as evidence of "superior knowledge," if discovered, would not affect our conclusion.

Plaintiffs suggest without much conviction that their acquiesence was the product of duress. Their explanation is that under the statute the municipalities were responsible to correct the excess of their pollution of navigable waters over allowable limits, by statuory deadline dates, whether or not they received grants to aid them in doing so. *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977). Therfore, as a practical matter, UOSA had no real option, it says, but to agree with whatever EPA proposed. We do not think enactment by Congress of laws protecting navigable waters, not asserted to be outside its constitutional power, could ever be held to constitute duress in the sense of the law of contracts. Rather they are "sovereign acts." *D. R. Smalley & Sons, Inc.* v. *United States*, 178 Ct. Cl. 593, 372 F. 2d 505, *cert. denied*, 389 U.S. 835 (1967). In any case it appears that by January 2, 1974, the Congress expressly negated the involved EPA interpretation by Pub. L. No. 93–243, 33 U.S.C. § 1283(d). This came soon enough to rescue all other municipalities from the extravagance in which UOSA says it

was entrapped, and no doubt would have rescued UOSA too if it had dragged its feet just a little and for long enough. It is difficult to see duress in a good faith executive policy the Congress no sooner heard of than corrected, and we consider the duress issue no further.

A leading case in this court, *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967), analyzes our jurisdiction under the Tucker Act, 28 U.S.C. § 1491, which is here invoked. It says noncontract claims must be for money, and must be in one or the other of two categories. The first is for money illegally exacted, and in Treasury coffers, as, *e.g.*, tax refund claims. The second is when the claimant urges that some specific provision of law commands expressly or by implication the payment of money, upon proof of conditions he is said to meet, *e.g.*, fifth amendment taking claims or claims by illegally discharged government employees for back pay. The Supreme Court approved this analysis in *United States* v. *Testan*, 424 U.S. 392 (1976) and applied it to exclude from our Tucker Act jurisdiction a claim that did not pass the *Eastport Steamship* test. Thus not every instance of misgovernment by a United States agency that is costly to private parties, or local and state interests, generates a valid Tucker Act claim. The misgovernment, *e.g.*, in *Eastport* caused the claimant company to lose an opportunity to sell a ship to foreign buyers at a good price, and made necessary acceptance of a much less favorable price a few months later. As we read the plaintiffs, they do not contend that their case will stand by either of the *Eastport* tests. They accept the onus of showing that their claim is founded on their interpretation of the grant agreement, the only privity of contract that existed with defendant.

They say they want an "equitable adjustment" in the grant agreement. But this term, familiar in litigation founded on the standard government disputes clause, not here involved, is inappropriate here. We think what they really want is an equitable reformation. What they would do is to reform the agreement and enforce it as reformed. But there was no duress the law can recognize and no mistake, as both sides knew what they were doing, even if they failed to foresee the full pecuniary consequences. There is no intimation of fraud. They say that the grant agreement imposed "commercially impracticable" requirements; that there was an "implied

warranty" that the UOSA plant could be constructed reasonably on an operable unit basis. They cite cases where, in supply or construction contracts, the government imposed impossible or impracticable requirements on suppliers or vendors. They rely on Mr. Justice Brandeis' doctrine, *United States* v. *Spearin*, 248 U.S. 132 (1918), that when the government prescribes design specifications, it warrants that an acceptable product can be produced according to them. But here, unlike the *Spearin* situation, it was the grantee who furnished the plans. If any party warranted that they were commercially practicable, it would seem it would have been the grantee.

Our leading recent case on grant agreements, *State of Texas* v. *United States*, 210 Ct. Cl. 522, 537 F.2d 466 (1976), holds that such an agreement is a contract enforceable in this court, but in such enforcement the government is bound only by its express undertakings. 210 Ct. Cl. at 531, 537 F.2d at 470–71. This without more would be fatal to the claim here, for the government's express undertaking was to pay 75 percent of the project cost, which it has done, and claimants would have it pay more. It may be conceded *arguendo*, that this statement does not prohibit the appropriate use of *Spearin* or other implied warranties, but what use is appropriate is influenced by the gratuitous nature of the grant. The responsibility to dispose of human waste without polluting navigable water is, after all, the state's, and the government acts on the scene as a deep-pockets volunteer. While we are not passing on a claim by the government against the state's subdivisions, the sources of the plans, such a claim on a *Spearin* theory would be far more plausible than the use of *Spearin* to support the instant claim. When the government prescribes how grant money is to be used, it is performing sovereign acts for which it is not liable on a contract theory. *D.R. Smalley & Sons, Inc.* v. *United States*, *supra*.

In the circumstances of this case, therefore, the government could not by rejecting plans not prepared on the operable unit basis, and accepting plans that were, be deemed to warrant that the approved plans were practicable or reasonable. The claim is therefore not contractual, but is one for misgovernment excluded from Tucker Act jurisdiction by the *Eastport Steamship* analysis.

This conclusion makes it unnecessary to consider whether or not the various municipalities, not in direct contract privity with the government, may join in this litigation on a third-party beneficiary theory. There is now no litigation to join in. The defendant's motion for summary judgment is granted and the petitions are dismissed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
C. FREDERICK GEILFUSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the federal government is liable under a grant contract for the increased cost of construction resulting from the grantee's compliance with a regulation promulgated by the Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-6a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1980. The petition for a writ of certiorari was filed on October 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

Title II of the Clean Water Act, 33 U.S.C. 1281 *et seq.*, authorizes the Environmental Protection Agency to fund 75% of the cost of construction of qualifying publicly-owned sewage treatment works. See 33 U.S.C. 1281-1284. In 1972, petitioner Upper Occoquan Sewage Authority ("UOSA") submitted plans to EPA for a construction grant regarding a new sewage treatment plant and pumping facilities.[1] Preliminary engineering reports for the project estimated that the combined facilities would cost $49.3 million. Because there were insufficient funds allotted to Virginia in fiscal years 1973 and 1974 to cover the cost of the project in any one year, UOSA's plans divided the project into three segments that were to

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[1] Pursuant to the Virginia Water and Sewer Authorities Act, Va. Code §§ 15.1-1239 *et seq.* (1973), four Virginia municipalities, including petitioner Manassas Park, created UOSA for the purpose of constructing and operating a sewage treatment plant. In the Court of Claims, the government argued that Manassas Park and the other municipalities are not proper parties to this suit. The court below did not reach this claim (Pet. App. 6a).

be funded over several years. The three segments were the plant itself, five new pumping stations, and the interceptor sewer lines and force mains (Pet. 3-4; Pet. App. 2a-3a).

At that time, EPA's regulations provided that no grant would be authorized except with regard to the "fabrication and building of a complete and operable treatment works." 40 C.F.R. 35.903(a) (1973). This regulation was designed to ensure that in the event of a subsequent termination or reduction in federal funding, earlier grants would not have been wasted on an unusable facility. Because each of the three segments of UOSA's initial plan was not a complete and operable treatment works, EPA rejected the grant application. Thereafter, UOSA redesigned its construction plan so that each step would constitute a complete and operable treatment works.[2] Allegedly as the result of these design changes, the cost of the total project rose to $82.28 million. EPA subsequently approved these plans and awarded grants totaling $55.5 million or approximately 75% of the project's cost, as required by 33 U.S.C. 1282(a). See Pet. 4-5; Pet. App. 2a-3a.

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[2] The new UOSA plan proposed that the construction be carried out in the following three phases:

Phase I. Construction of most of the proposed force mains and new interceptor sewer lines, pumping stations, and plant head works.

Phase II. Construction of additional interceptor sewer lines, remaining portions of the plant proper, final effluent reservoir, sludge dewatering equipment and carbon regeneration facilities.

Phase III. Construction of the remaining interceptor sewer lines and the waste handling system for the plant proper.

In 1979, UOSA and the four municipalities serviced by the UOSA treatment works filed this suit for damages in the Court of Claims. Petitioners claimed that the United States is liable for their portion (25%) of the approximately $33 million increase in cost allegedly attributable to EPA's unlawful requirement that each grant contract cover a complete and operable facility. In addition, petitioners contended that EPA's regulation breached the implied warranty of the grant contract by rendering the contract commercially impracticable and unreasonable.

The Court of Claims granted the government's motion for summary judgment. The court first observed that in light of its limited jurisdiction, petitioners' claim must necessarily be founded upon a contract, here the grant agreement (Pet. App. 4a).[3] The court further concluded that there is no equitable basis for reforming the grant contract and that, by the express terms of the contract, the government promised only to pay for 75% of the cost of construction (*id.* at 4a-5a). The court also held that EPA had made no implied warranty regarding the commercial practicability of the contract plans, particularly since it was petitioners who had furnished those plans (*ibid.*).

ARGUMENT

Petitioners do not suggest that EPA failed to pay 75% of the cost of their sewage treatment project or otherwise failed to adhere to the express terms of the construction grant. Rather, petitioners contend (Pet. 5-8) that the government is liable for more than 75% of the project's cost because EPA

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[3] Petitioners did not contest this point (Pet. App. 4a).

allegedly imposed an unlawful condition on the construction project and because EPA breached an implied warranty of commercial practicability. The Court of Claims correctly rejected these claims, however, and that decision does not conflict with any decision of this Court or of any court of appeals. Furthermore, because the EPA regulation that gives rise to this case has been superseded by statute,[4] the precise issues presented here have no prospective significance. Accordingly, further review by this Court is unwarranted.

In any event, as the court below held, the government was not liable for any excess cost incurred by petitioners as the result of EPA's operable unit policy, even if that policy was an improper interpretation of the Clean Water Act.[5] UOSA was not required to enter into a grant contract, but rather voluntarily chose to do so, even though it was fully aware that existing federal regulations required that the project be built in operable segments. That the cost of the project was perhaps made greater as a result of EPA's policy decision simply is not a basis for equitably reforming the contract or otherwise imposing liability upon the sovereign. See *D. R.*

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[4] In 1974, Congress amended the Clean Water Act to provide that each part of a project need not be an operable unit, as previously required by 40 C.F.R. 35.903(a) (1973). See Pub. L. No. 93-243, Section 2(d), 87 Stat. 1069, codified at 33 U.S.C. 1283(d).

[5] Petitioners recognize (Pet. 7) that their suit in the Court of Claims is limited to contract claims. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967).

Smalley & Sons, Inc. v. *United States*, 372, F.2d 505, 507 (Ct. Cl.) cert. denied, 389 U.S. 835 (1967). As the Court of Claims pointed out (Pet. App. 3a-4a), EPA's allegedly unlawful policy falls far short of constituting duress, fraud, or any other basis for allowing petitioners to avoid the express terms of the grant contract. Cf. *Texas* v. *United States*, 537 F.2d 466, 470-471 (Ct. Cl. 1976).

Relying on *United States* v. *Spearin*, 248 U.S. 132 (1918), petitioners further contend (Pet. 6-7) that EPA's operable segment policy breached an implied warranty of commercial practicability. It is well settled, however, that ordinarily the government is liable only for breach of *express* undertakings in a grant contract. See *Texas* v. *United States*, *supra*, 537 F.2d at 470-471; *D. R. Smalley & Sons, Inc.* v. *United States*, *supra*, 372 F.2d at 507. *Spearin* is not to the contrary. In that case, liability was imposed on the government acting as a purchaser because its plans and specifications, which had been relied on and followed by the contractor, proved to be defective. In contrast, here petitioners and not the government developed and supplied the plans and specifications. Hence, "[i]f any party warranted that [the plans] were commercially practicable, it would seem [to] have been [petitioners]" (Pet. App. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
C. FREDERICK GEILFUSS
Attorneys

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